



**U.S. Citizenship
and Immigration
Services**

**Non-Precedent Decision of the
Administrative Appeals Office**

MATTER OF C-T-S-C-S-S-

DATE: JUNE 17, 2016

APPEAL OF TEXAS SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, a non-profit educational institution, seeks classification for the Beneficiary as an individual of exceptional ability in the sciences. *See* Immigration and Nationality Act (the Act) section 203(b)(2)(A), 8 U.S.C. § 1153(b)(2)(A). This second preference classification makes immigrant visas available to foreign nationals with a degree of expertise significantly above that normally encountered in the sciences, arts, or business.

The Director, Texas Service Center, denied the petition, finding that the Petitioner did not establish that the position for which it seeks the Beneficiary's services requires an individual of exceptional ability.

The matter is now before us on appeal. The Petitioner alleges on appeal that the Director erred in concluding that the job for which it seeks the Beneficiary does not require an individual of exceptional ability.

Upon *de novo* review, we will dismiss the appeal.

I. LAW

Section 203(b)(2) of the Act provides classification to individuals who, because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States. The implementing regulation at 8 C.F.R. § 204.5(k)(2) states: "Exceptional ability in the sciences, arts, or business means a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business."

To show that a beneficiary's services are sought by an employer in the United States, a petitioner must provide an individual labor certification from the Department of Labor, an application for Schedule A designation, or documentation to establish that the beneficiary qualifies for one of the shortage occupations in the Department of Labor's Labor Market Information Pilot Program. 8 C.F.R. § 204.5(k)(4)(i). The documents presented must show that the position for which the beneficiary's services are sought requires an individual of exceptional ability. *Id.*

To demonstrate qualification for certification under Schedule A, Group II, a petitioner must submit evidence of the beneficiary's exceptional ability in the sciences or arts as demonstrated by widespread acclaim and international recognition from recognized experts in the field. 20 C.F.R. § 656.15(d)(1). Among other evidentiary requirements, the petitioner must show that the beneficiary's work in that field during the past year required exceptional ability and that the position for which it seeks the beneficiary's services also requires exceptional ability. *Id.*

II. ANALYSIS

The Petitioner seeks to employ the Beneficiary as an advanced placement (AP) high school physics teacher. The Director found that 1) the Petitioner established the Beneficiary possesses exceptional ability in the sciences, but 2) it did not show that the position in which it seeks to employ the Beneficiary requires an individual of exceptional ability. Upon *de novo* review, we agree with the Director and find that, while the Petitioner has demonstrated the Beneficiary's exceptional ability, it has not shown that its position of AP physics teacher requires an individual of exceptional ability. As a result, the Petitioner has not established qualification for Schedule A, Group 2 certification (20 C.F.R. § 656.15(d)(1)), or eligibility for this immigration benefit (8 C.F.R. § 204.5(k)(4)(i)).

The Director based the denial on information provided about the position on the ETA Form 9141, Application for Prevailing Wage Determination (prevailing wage determination), and the ETA Form 9089, Application for Permanent Employment Certification (labor certification). In particular, he addressed the portions of these submissions that discuss the position's education and experience requirements, as well as its job duties. The Director noted that the position requires a bachelor's degree, no related experience, and pays slightly above the Level I prevailing wage for secondary school teachers. He concluded that such specifications are not consistent with an individual of exceptional ability. On appeal, the Petitioner alleges that the Director failed to consider the language of the labor certification and prevailing wage determination, that he should have considered evidence beyond the information contained on these forms, that he improperly imposed new requirements for eligibility, and that he erred in applying the preponderance of evidence standard. We discuss the record of evidence and each of the alleged errors below.

As noted by both the Director in the denial and the Petitioner on appeal, we must examine the language of the labor certification to determine what the job requires. *See Mandany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983). The labor certification in this submission indicates that the position requires a bachelor's degree and no years of related experience. It also provides that the position is a Level I, or entry level, secondary school teacher. All of these factors suggest that the position does not require an individual of exceptional ability. The Petitioner states, however, that the Director ignored other language contained in the labor certification.

Specifically, the Petitioner takes issue with the Director's statement that the position does not require any license or certification. Both the labor certification and prevailing wage certification state: "Must be eligible for Texas State Board for Educator Certification in Physics/Mathematics and Science Grades 8-12 or be currently enrolled in a certification program." We agree this is relevant

language, but note it requires only that an applicant be eligible for certification, not that he or she already possess it. Moreover, although licensure is listed as a criterion potentially indicative of exceptional ability under 8 C.F.R. § 204.5(k)(3)(ii), the Petitioner has not provided evidence to show that certification is a sign of exceptional ability in the teaching profession. On the contrary, certification is a prerequisite for teaching in Texas in both public and private schools.¹ For these reasons, the requirement that an individual be eligible for a Texas teaching certification does not suggest the job requires an individual of exceptional ability.

In addition, the Petitioner states that the Director erred by not acknowledging the following statement contained in both the prevailing wage determination and labor certification: “Exceptional ability required to teach high school students for college credit.” The Petitioner urges that this language refutes the Director’s conclusion that “the petitioner did not list any specific requirements on the labor certification that would be appropriate for a job that requires a worker of exceptional ability.” We note the precedents cited by the Petitioner regarding the importance of the specific language contained in the labor certification and agree that all listed requirements must be considered. Writing requirements that merely repeat the language of the statute or regulations, however, cannot satisfy the petitioner’s burden of proof. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff’d*, 905 F. 2d 41 (2d. Cir. 1990). We need not accept primarily conclusory assertions. *1756, Inc. v. Att’y Gen of the United States*, 745 F. Supp. 9, 17 (D.C. Dist. 1990). In this case, the statement that the position requires exceptional ability to teach high school students for college credit must be supported by the job duties listed and other evidence in the record.

The labor certification lists the following job duties for the position of AP physics teacher:

Create lesson plans. Teach Physics and other science courses to students in grade 8-12. Support the school’s STEM initiative. Teach the school’s Advanced Placement courses in Physics and other science disciplines, including courses in the school’s dual-credit program with partnering university. Report grades. Be available to students for supplemental instruction and mentoring as needed to ensure academic success and character development in line with school objectives and values to prepare students for college success and community involvement. Undertake other faculty and school-related responsibilities, and participate in school-related functions as normal for a high school teacher.

The Petitioner states that these duties require an individual of exceptional ability. In particular, it emphasizes the duty relating to “[t]each[ing] the school’s [AP] courses in Physics and other science disciplines, including courses in the school’s dual-credit program with partnering university.” The Petitioner urges that, most significantly, this means it needs an individual who can teach at a post-secondary level for its dual credit program.

¹ See U.S. Dep’t of Education, *State Regulation of Private Schools* (2009), <https://www2.ed.gov/admins/comm/choice/regrprivschl/regrprivschl.pdf>.

A dual credit course is taught in high school by a high school teacher, but has been approved by a partnering university that agrees to give college credit to the students who achieve a sufficiently high grade in the course. The Petitioner provided documentation regarding the steps for acquiring approval for [REDACTED] dual credit program: the high school must submit a résumé and transcripts for the course instructor, who in general, must have a master's degree or a bachelor's degree and 10 years of related experience. The high school must also provide course information, such as syllabi and course evaluation methods, including samples of the assignments, exams, and rubrics used.

The Petitioner provided documentation showing it offered four dual credit classes in 2014 in conjunction with [REDACTED] astronomy, physics, public speaking, and English composition. The Beneficiary taught astronomy and physics. The record contains the syllabi for the Petitioner's two courses, as well as evaluations for his classes completed by a [REDACTED] dual credit representative. The evaluation form calls for an examination of the acceptability of the communication, course design, and assessment methods. It lists observation criteria followed by the option of checking yes or no for each, and includes room for the [REDACTED] dual credit representative's comments throughout.

The relevant question is whether the requirements for teaching a dual credit class are sufficiently rigorous that they necessitate an instructor of exceptional ability. The Petitioner suggests that high school dual credit classes are comparable to a college-level university courses, and notes that post-secondary instructors must generally have advanced degrees. While the [REDACTED] indicates that it prefers advanced degrees, it does not require them. Aside from the ability to obtain credit from [REDACTED] the Petitioner has not shown how its dual credit courses differ from an AP course or classes otherwise taught to advanced high school seniors. No college students attend the dual credit classes, and the Petitioner has not indicated that acquiring [REDACTED] approval for dual credit required any significant changes to a typical high school course. The record does not indicate that [REDACTED] has ever denied a high school's application for dual credit. In addition, the evidence in the record does not show that the instructors of the Petitioner's other dual credit courses, English Composition and Public Speaking, have the exceptional ability it states is necessary to teach a dual credit course.²

Other considerations raised on appeal include the Petitioner's STEM (science technology engineering and math) initiative and the need for qualified teachers in STEM subjects. The Petitioner provided a statement from its headmaster explaining that it has recently invested substantial resources in upgrading Internet access, purchasing iPads, building science and computer

² Although the Petitioner submitted numerous printouts from its website, it did not include the pages related to hiring. We note that it currently seeks an AP English teacher, presumably the individual responsible for teaching dual credit English Composition and/or Public Speaking. The job description states: "We are seeking a mature evangelical Christian teacher for the 2015-16 school year who is certified in Secondary English in Texas. AP experience a plus. Responsibilities include lesson planning and content delivery to secondary school students." See Employment, [REDACTED]

(Jun. 16, 2016, 3:50 PM), [REDACTED] (A copy of the web page is incorporated into the record.) The announcement further indicates that the position requires a bachelor's degree and one year of experience. These requirements would support our conclusion that exceptional ability is not required for instructors of dual credit courses.

labs, and adding new STEM course offerings. The Petitioner has not explained, however, why its focus on STEM education means the position of AP physics teacher requires an individual of exceptional ability. The initiative may speak to the value the Petitioner places on the position, but it does not inherently create additional job requirements such that the position requires an individual of exceptional ability.

Similarly, the articles submitted by the Petitioner regarding the need for STEM-focused education and qualified STEM teachers speak to the value placed on such classes and the availability of qualified individuals to teach them. They do not address whether the particular duties in the Petitioner's position require an individual of exceptional ability. A letter from the Petitioner's headmaster references the challenges of teaching bright teenaged students who have emotional as well as educational needs, but neither the letter nor the other evidence in the record demonstrates that these issues are unique to, or more of a concern for, the offered position. As a result, these other factors do not show that the position requires a degree of expertise significantly above that ordinarily encountered.

On appeal, the Petitioner also indicates that the Director improperly "imposed additional requirements, including, but not limited to, the non-existent requirement that the petitioner list all possible alternative combinations demonstrating exceptional ability and that the position require at least ten years of full-time experience in AP Science Teaching." Upon review of the Director's decision, we find neither of these requirements imposed. The denial contains no language referencing "all possible alternative combinations demonstrating exceptional ability." Regardless, if the position does require an individual of exceptional ability, this need should be demonstrated by the job duties and requirements listed, or by other evidence provided with the petition. However, as noted above, this is not reflected in the job duties or other evidence submitted. In addition, while the denial notes that the Petitioner's position does not require 10 years of experience, we do not read this remark as imposing an additional requirement. Rather, the statement points out that the Petitioner's position of AP physics teacher does not require the 10 years of experience considered by regulation to be an indicator of exceptional ability. *See 8 C.F.R. § 204.5(k)(3)(ii)(B).*

The Petitioner also disagrees with the Director's determination that the wage it offers for the position does not show that the job requires an individual of exceptional ability. The prevailing wage determination submitted is for a Level I wage for an AP science teacher, which is \$41,460. According to the labor certification, the wage the Petitioner will offer for the position is \$45,500 per year. The Petitioner charges that the Director erred by failing to recognize that the offered salary represents a 10% premium above the Level I prevailing wage. It further states that the Director did not consider that the Beneficiary is a new teacher, or that it is a private school, which typically pays less than a public school.

Although the Director did not specifically acknowledge the 10% increase, he did provide a detailed description of each of the four levels for prevailing wage rates: Level I (entry), Level II (qualified), Level III (experienced), and Level IV (fully competent). The Director explained that Level I wages reflect the lower end of the pay scale for beginning level employees who have only a basic

understanding of the occupation. The Director then noted that wage information for the three higher levels is not included in the Petitioner's comparison. We agree that the use of a Level I wage for comparison is problematic in that, by definition, it reflects the rate paid to individuals with the lowest skill set in the profession. A salary that is 10% above an entry level wage does not suggest the position requires an individual of exceptional ability.

The Petitioner also provided a printout from [REDACTED] indicating that the median wage in 2014 for secondary school teachers in the greater [REDACTED] Texas area was \$47,700 per year, more than the \$45,500 per year offered by the Petitioner. A salary below the median wage does not support a finding that the position requires an individual of exceptional ability. The Petitioner states that we should consider the Beneficiary's few years of experience when evaluating his salary. However, the fact that the Beneficiary is a new teacher does not demonstrate that the position requires someone of exceptional ability, but instead explains why he received a salary slightly above the prevailing entry level rate.

Lastly, the Petitioner provided articles noting that private school teachers get paid less than their public school counterparts. On appeal, the Petitioner urges the importance of this factor in evaluating whether the Beneficiary's salary indicates exceptional ability. We acknowledge these articles, but note that the Petitioner did not provide consistent information regarding average private school salaries for the relevant area and time period to show that the Petitioner's offered wage, when compared to the wage offered by other private schools, is indicative of exceptional ability. An article from the [REDACTED] states that, according to the Bureau of Labor Statistics (BLS), the annual income of private school teachers at the secondary education level in 2010 was \$50,797, while the National Center for Education Statistics reported the annual income of private school teachers at the secondary education level in 2007-08 to be \$39,890. After comparing these figures with the position's salary of \$45,500, we cannot conclude that it is indicative of exceptional ability, even when compared to figures solely for private school salaries. As a result, we do not find the wage offered by the Petitioner demonstrates that the position requires an individual of exceptional ability.

For the above reasons, we find insufficient evidence in the record in support of the statement on the labor certification that the position requires an individual of exceptional ability to conclude that it satisfies the Petitioner's burden of proof on this issue.

II. CONCLUSION

The Petitioner has not shown that the position for which it seeks the Beneficiary's services requires an individual of extraordinary ability as required under both 8 C.F.R. 204.5(k)(4)(i) and 20 C.F.R. § 656.15(d)(1).

The appeal will be dismissed for the above stated reasons, with each considered an independent and alternate basis for the decision. In visa petition proceedings, it is the Petitioner's burden to establish

eligibility for the immigration benefit sought. Section 291 of the Act. Here, that burden has not been met.

ORDER: The appeal is dismissed.

Cite as *Matter of C-T-S-C-S-S-*, ID# 16857 (AAO June 17, 2016)